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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

U.S.A.C. TRANSPORT, INC.,
COMMON CARRIER CONFERENCE — IRREGULAR ROUTE,
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,

AND

REGULAR COMMON CARRIER CONFERENCE
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellants

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

On Appeal from the United States District Court for the Western District of Missouri—Western Division

JURISDICTIONAL STATEMENT

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December 5, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT	4
THE QUESTIONS ARE SUBSTANTIAL	7
CONCLUSION	15
CERTIFICATE OF SERVICE	16
APPENDIX A (Judgment of the Court below in *J-T Transport Company, Inc.*, Plaintiff, v. *United States of America and Interstate Commerce Commission*, Defendants)	1a
APPENDIX B (Statutes Involved)	2a

CITATIONS

CASES:

American Trucking Associations, Inc., et al. v. Frisco Transportation, 358 U.S. 133	2
American Trucking Associations, Inc., et al. v. U. S., et al., 364 U.S. 1	2
C. & D. Oil Co. Contract Carrier Application, 1 M.C.C. 329, 332 (1936)	13
Frozen Food Express, Inc. v. U.S., 351 U.S. 40	2
M. & M. Transportation Co. v. U.S., 350 U.S. 857	2
Smith & Solomon Trucking Co., Extension—Camden, N. J., 61 M.C.C. 748, 752-753 (1953)	11
Smith & Solomon Trucking Co. v. U.S., 120 F. Supp. 277 (1954)	11
United States v. Contract Steel Carriers, 350 U.S. 409	7

STATUTES: Page

Interstate Commerce Act, 49 U.S.C. 1 et seq.

National Transportation Policy 3, 10, 13, 14, 15

Section 203(a)(15), 49 U.S.C. 303(a)(15) 3

Section 209(b), 49 U.S.C. 309(b) 3, 9, 13, 14

Judicial Code, 28 U.S.C. 1 et seq.

Section 1253, 28 U.S.C. § 1253 2

Section 1336, 28 U.S.C. § 1336 2

Section 1398, 28 U.S.C. § 1398 2

Section 2101(b), 28 U.S.C. § 2101(b) 2

Section 2284, 28 U.S.C. § 2284 2

Sections 2321 to 2325 inclusive, 28 U.S.C. §§ 2321 to 2325 inclusive 2

MISCELLANEOUS:

I.C.C. 70th Annual Report (1956) 7

S. Rep. 703, 85th Congress, 1st Session (1957) 7, 8

H. R. Rep. 970, 85th Congress, 1st Session (1957) 8

1957 Hearings Before Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 85th Congress, 1st Session, volume entitled "Surface Transportation-Scope of Authority of ICC", at 300, 304 14

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri is reported at 185 F. Supp. 838. Because it is relatively long and since it is set forth as Appendix A to the Jurisdictional Statement being concurrently filed by the Interstate Commerce Commission, we respectfully ask leave to

treat that opinion thus reproduced as if incorporated herein. The decisions of Division 1 of the Interstate Commerce Commission and of the entire Commission appear, respectively, at 74 M.C.C. 324 and 79 M.C.C. 695. Because they are set out as Appendices C and D, respectively, to the Jurisdictional Statement being concurrently filed herein by the Interstate Commerce Commission, and because they are quite lengthy, we respectfully ask to treat those decisions thus reproduced as if incorporated herein.

JURISDICTION

The suit was brought under 28 U.S.C. §§ 1336, 1398, 2284 and 2321 to 2325, inclusive, to set aside orders of the Interstate Commerce Commission. The judgment of the District Court, attached as Appendix A, was entered on August 9, 1960, and notice of appeal was filed in that court by U.S.A.C. Transport, Inc., Common Carrier Conference — Irregular Route, of American Trucking Associations, Inc., and Regular Common Carrier Conference of American Trucking Associations, Inc., on October 7, 1960.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *M. & M. Transportation Co.* v. *U. S.*, 350 U.S. 857, *Frozen Food Express, Inc.* v. *U. S.*, 351 U.S. 40, *American Trucking Associations, Inc., et al.* v. *Frisco Transportation*, 358 U.S. 133, and *American Trucking Associations, Inc., et al.* v. *U. S., et al.*, 364 U.S. 1.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Section 1, and Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15) and 309(b), are set forth verbatim in Appendix B.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission is now required by law to grant to a motor contract carrier applicant therefor a permit regardless of the existence of motor common carriers able and willing to provide the considered service.

2. Whether in interpreting Section 209(b) of the Interstate Commerce Act requiring the Commission to consider "the effect which granting the permit would have upon the services of the protesting carriers" the District Court erred in holding that the test relates only to diversion of traffic presently enjoyed in serving the affected shipper and excludes consideration of diverting potential traffic which the protesting carriers are willing and able to transport.

3. Whether the District Court erred in concluding that the Interstate Commerce Commission, in its denial of a permit to applicant, placed upon applicant the burden of proving inadequate the services of existing carriers.

4. Whether the District Court erred as a matter of law in limiting the factors which the Commission may consider in granting or denying a contract carrier application so that only the factors enumerated in the 1957 amendments to Section 209(b) are relevant.

STATEMENT

This proceeding had its genesis when appellee, J-T Transport Company, Inc., (J-T) filed an application on March 14, 1957, with the Interstate Commerce Commission for additional operating authority as a contract carrier by motor vehicle in order to transport aircraft assemblies, uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis, Ind., to Wichita, Kans., over irregular routes. A hearing was held on this extension application before an examiner of the Commission and the application was opposed by various railroads as well as by several motor carriers, including appellant U.S.A.C. Transport, Inc., hereinafter called U.S.A.C.

U.S.A.C. is a specialized motor common carrier presently authorized to transport, insofar as here material, aircraft parts, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, between the points involved. The record in the administrative proceeding shows that U.S.A.C. solicited the instant traffic (R. 70);[1] and that the shipper was aware that U.S.A.C. held the necessary operating rights to transport the items here involved. (R. 66) While an alleged unsatisfactory experience with U.S.A.C. was mentioned by the shipper witness at the Commission hearing, the witness was unable to answer specific questions with respect thereto and the hearing examiner prohibited counsel for U.S.A.C. from cross-examining the shipper

[1] "R" refers to pages in the hearing transcript transmitted to this Court as part of plaintiffs' exhibit A in the record of the court below.

witness on this alleged experience on the ground that it was too remote in time. (R. 67)

The hearing examiner, in a recommended report and order, proposed that the application be granted. After U.S.A.C. and the railroad protestants filed exceptions to the recommended report and order and appellee J-T replied thereto, Division 1 of the Commission denied the application in a report and order dated January 31, 1958, appearing in 75 M.C.C. 324. In denying the application, said Division concluded, *inter alia*, that: "A service not needed cannot be found consistent with the public interest or the national transportation policy."

Shortly thereafter, petitions for reconsideration and replies thereto were filed, but the entire Commission sustained the Divison 1 decision, and denied the petition for reconsideration by order dated July 25, 1958. Subsequently, appellee J-T Transport filed another petition for reconsideration with the Commission based on a Commission decision allegedly inconsistent with the Commission decision under consideration herein. The Commission granted this second petition for reconsideration and reopened the proceeding. Petitions for leave to intervene in the reopened proceeding were filed by the Common Carrier Conference — Irregular Route and by the Regular Common Carrier Conference, both affiliated with the American Trucking Associations, Inc., and both joint appellants herein. On June 25, 1959, the entire Commission issued a report on reconsideration, dated June 15, 1959, 79 M.C.C. 695, again denying the appellee's application, along with another application not here involved. In denying the application, the Commission held:

". . . It is sufficient at this point to say that, in view of our finding herein that U.S.A.C. is in a position to provide any service that is needed, we conclude that a grant of authority to applicant would have an adverse effect upon that protestant. It may be worthy of repeating, however, that in the economic regulation of motor transportation through grants of operating authority, the principle that existing carriers should be accorded the opportunity to transport available traffic that they can handle adequately, efficiently, and economically in the territories they serve before a competitive service is authorized is sound doctrine, in the public interest, and in the furtherance of the national transportation policy, whether the application is one for common or contract carrier authority." (p. 707)

Thereupon, appellee filed its complaint on August 21, 1959, in the United States District Court for the Western District of Missouri, attacking the validity of the Commission orders of January 31, 1958, and of June 15, 1959. The Regular Common Carrier Conference, the Irregular-Route Common Carrier Conference, as well as U.S.A.C. were permitted to participate in the lower court proceeding as intervening defendants. On August 9, 1960, the lower court issued its decision, 185 F. Supp. 838, *supra*, setting aside the assailed orders of the Interstate Commerce Commission, declaring them unlawful and void, and remanding the case to the Commission for further proceedings consistent with the court's rulings. Thereafter, the Interstate Commerce Commission and the joint appellants herein filed their respective notices of appeal to this Court.

THE QUESTIONS ARE SUBSTANTIAL

This proceeding is a case of first impression, interpreting important amendments enacted in 1957 to the Interstate Commerce Act. Those amendments were foreshadowed by the decision of this Court in *United States* v. *Contract Steel Carriers*, 350 U.S. 409, where the Court said that "A contract carrier is free to aggressively search for new business within the limits of its license".

The Interstate Commerce Commission proposed legislation[2] which, *inter alia*, would amend the definition of "contract carrier" and authorize the Commission to limit the number of patrons a contract carrier might serve. Numerous witnesses were heard on the bill, S. 1384, as introduced in the Senate, and a report[3] was issued thereon concluding in these words:

> "Your committee is of the opinion that the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed."

This Court is now asked to review an interpretation of the subject amendments in question. We respectfully suggest that the decision below is not in harmony with the opinion of the Senate Committee expressed in the language quoted just above.

1. The first question to be considered is whether the Interstate Commerce Commission is now required by law to grant to a motor contract carrier applicant

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[2] I.C.C. 70th Annual Report, P. 162, (1956).

[3] S. Rep. 703, 85th Congress, 1st Session (1957).

therefor a permit regardless of the existence of motor common carriers able and willing to provide the considered service. It is imperative that this view of the law be reviewed, for, unless it be reviewed and reversed, it will mean that contract carrier applicants, almost as a matter of course, will be entitled to permits in circumstances, such as here present, where the Commission has already authorized common carriers to provide the identical service. The traffic loss to the presently certificated carriers would be irreparable.

Nowhere in the legislative history of the 1957 amendments to the contract carrier provisions of Part II of the Interstate Commerce Act can there be found language supporting the conclusion of the lower court on the question at hand. The Senate Committee, reporting on S. 1384 related testimony showing that already in-roads upon common carriage had been made by unlimited contract carriage and that the Committee undertook to correct that situation. (Senate Report 703, *supra*, pp. 4, 7 (1957)). Can it be that the Senate Committee, and Congress, sought to protect common carriage against the competition of unlimited contract carriage and, by the same measure, intended to destroy the result so clearly expressed? At no time during the deliberations before Congress, and at no place in either House[4] or Senate Committee Reports, was there language which would exclude consideration of the service of existing common carriers when the question of a grant to a contract applicant was before the Commission.

The grant of new operating authority, or its denial, calls for a realistic valuation of demonstrated facts.

[4] H.R. Rep. 970, 85th Congress, 1st Sess. (1957).

Obviously no grant of either common or contract rights can be justified if there is no need for the service. In effect, convincing evidence of need for a contract carrier specialized service usually demonstrates concurrently that existing common carriers do not meet, or are not in position to meet, the shipper's requirements. If, as the court below seems to hold, the existence of adequate common carrier service is immaterial, the Commission would be obliged to license a contract carrier even though no need for its service had been shown to exist. The very statement of the concept prompts question of its validity.

That the Commission is compelled by the statute to consider the effect upon existing carriers is seen in the language of Section 209(b), *supra*, which requires that "the Commission 'consider . . . the effect which granting the permit would have upon the services . . . the protesting carriers . . .' ". That effect, as hereinafter developed, may be adverse even where there is no actual diversion of traffic presently carried.

It becomes manifest that a challenge—indeed, a denial—of the Commission's right to observe the specific injunction of the statute should be reviewed.

2. The opinion of the court below is clearly to the effect that the Commission may not give weight to evidence that a certificated, operating carrier is able and willing to furnish a shipper's transportation needs. And going further in the same vein the court, in construing the language of Section 209(b) that the Commission must consider "the effect which granting the permit would have upon the services of the protesting carriers", holds that the "effect" to be considered is only the effect upon traffic actually

enjoyed and physically moved. In that view the availability, willingness, ability—indeed, the eagerness—of a presently existing common carrier may not be considered.

An important new principle in transport regulation, it appears, would thus be created. Hereafter, when a *common carrier applicant* seeks authority, the Commission could still consider the effect upon existing common carriage. On the other hand, when a *contract carrier applicant* seeks authority, the Commission is proscribed from considering the effect upon existing common carriage.

For companies such as appellant U.S.A.C. the situation is starkly realistic. U.S.A.C. specializes in the transportation of aircraft parts, particularly parts for military aircraft. Since military aircraft are especially subject to obsolescence, it is evident that potential traffic is peculiarly important to the aircraft parts transporter. If consideration of the effect of a grant of a contract-carrier application upon protesting carriers is limited to the effect upon the services of carriers actually participating in the involved traffic, all new aircraft parts traffic would be siphoned off by contract carriers, such as J-T, on the ground that presently authorized carriers, such as U.S.A.C., would not be adversely affected by any diversion of traffic. Under this line of reasoning, specialized motor common carriers, such as U.S.A.C., would soon be relegated to the handling of small volumes of residual traffic, and the less desirable traffic not wanted by contract carriers. The resultant effect upon an aircraft parts carrier would scarcely be the production of that economic stability which is one of the announced goals of the National Transportation

Policy. And what is true peculiarly of U.S.A.C. is true likewise of any common carrier.

If the Commission in summary fashion granted all contract carrier applications without considering the effect upon existing carriers, the granting of such permits would be an automatic removal of actual *and potential* traffic from the entire common carrier system. As the Commission said in *Smith & Solomon Trucking Co., Extension—Camden, N. J.*, 61 M.C.C. 748, 752-753 (1953):

> "A certificate is a legal privilege. Unless we protect it, we destroy its value. We cannot expect motor carriers to carry out their obligations if we create situations which subvert their efforts to render adequate and efficient service." (Aff'd.—*Smith & Solomon Trucking Co.* v. *U. S.*, 120 F. Supp. 277 (1954)).

Potential traffic is as important as presently enjoyed traffic if the common carrier industry is to survive. Modern industry portrays a continually changing picture. Plants and locations of commercial houses are moved frequently; old products are constantly supplanted by new lines. A fluid traffic pattern results. The instant traffic involves a part for the B-52 airplane. But what is the plane now in construction? The part or accessory in developmental stage? If, in showing adverse effect, a protesting carrier is required to show diversion of actual traffic moved, strangulation of present carriers will have been the gift of the 1957 amendments.

3. On the question of applicant's burden of proof the Court below stated:

"The Commission goes beyond the language and scope of the statute when it assumes and requires:

> (a) That applicant carries the burden of showing that existing services are inadequate; . . ."

It is urged that the Court erred in reaching the foregoing conclusion.

What the Commission actually stated respecting applicant's burden is most persuasive:

> "Considering the highly specialized service in transporting traffic similar to that here considered which U.S.A.C. is presently rendering to numerous manufacturers and suppliers in the aircraft industry, its ability and willingness to provide the service which the supporting shippers require, and the fact that, with respect to the instant traffic, neither shipper has attempted to avail itself of U.S.A.C.'s services, we cannot find that existing service has been shown to be inadequate. Plainly, there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C. To the contrary, the very business of U.S.A.C. is the transportation of the type of traffic involved." (79 M.C.C. 695, 708-709.)

Thus it is seen that the Commission has expected protesting carriers to come forward—as did U.S.A.C. here—and demonstrate their ability to provide an adequate service for the subject transportation.

Appellants take the position that the statute has not placed upon a contract carrier applicant the burden of proving directly the inadequacy of existing service by presenting detailed knowledge of a protestant's operations. Rather, the burden is upon protestants

to present such evidence. However, in order to determine existence of a need for service which would justify a grant of new or extended authority the Commission assuredly may look to any probative evidence of record, whether by applicant, by applicant's shipper witness, or by protestants, to reach its conclusion.

So important is the adequacy of existing service as a factor in the grant of authority under the 1957 amendments that the duty to present evidence of such service, and the limitations upon the Commission in this respect, should be passed upon.

4. The court below concluded that the five factors set forth in Section 209(b) are exclusive and that the Commission is not allowed to consider any other factors in deciding whether to issue a permit to one seeking new or additional operating authority. We find nothing in the 1957 amendments themselves requiring this restrictive treatment of evidence and nothing in their legislative history to support this result.

Among the tests applied by the Commission since the beginning of motor carrier regulation to determine whether a permit should be granted is the adequacy-of-existing-service-test. *C. & D. Oil Co. Contract Carrier Application,* 1 M.C.C. 329, 332 (1936). Congress may be presumed to have been aware of the application of this test when, in 1957, the subject legislation was before it. However, it took no step to modify it, or to exclude it. Moreover, since the National Transportation Policy requires that the Interstate Commerce Act be administered so as to provide "adequate, economical and efficient service",

the adequacy test is not merely justified, but required. Efficiency and economy are not enhanced by the unnecessary duplication of services.

The record of the hearings before the Surface Transportation Subcommittee of the Senate Committee on Interstate and Foreign Commerce discloses evidence that the amendments to Section 209(b) of the Act as proposed by the Contract Carrier Conference of The American Trucking Associations and adopted by Congress would not make it easier for contract carriers to obtain new authority except where the proposed service is purely a substitute for private carriage. That was the representation made to the Congress by the Spokesman of that Conference.[5] The Conference now represents to the courts that the amendment as adopted by the Congress and enacted into law facilitates obtaining a grant of new or additional authority by a contract carrier applicant notwithstanding existing common carrier service.

It is proper here to note that in addition to the criteria enumerated in Section 209(b) (49 U.S.C. 309(b)) there are the specific requirements in that section that an applicant be shown to be "fit, willing and able" to perform the proposed service. Besides, since, in Section 209(b), Congress made specific reference to consistency with the public interest, and to observance of the National Transportation Policy as objectives to be met in passing upon a contract carrier grant, there is no reason to believe that every element comprising those broad objectives is omitted

[5] 1957 Hearings Before Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 85th Congress, 1st Session, volume entitled "Surface Transportation—Scope of Authority of ICC", at 300, 304.

simply because not enumerated in specific language. It is inconceivable that fitness, willingness and ability are no longer criteria, nor that the broad range of the Commission's discretion under the National Transportation Policy has been contracted by the 1957 amendments here in question.

CONCLUSION

The questions presented by this appeal are substantial and of such public importance as to require plenary consideration, with briefs and oral argument for their resolution.

Respectfully submitted,

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December 5, 1960

CERTIFICATE OF SERVICE

I, Roland Rice, one of the attorneys for appellants U.S.A.C. Transport, Inc., Common Carrier Conference —Irregular Route, of American Trucking Associations, Inc., and Regular Common Carrier Conference of American Trucking Associations, Inc., and member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of December, 1960, I served copies of the foregoing Jurisdictional Statement on the several parties as follows:

1. On the United States, by mailing copies, duly addressed and postage prepaid, to Hon. J. Lee Rankin, The Solicitor General, Department of Justice, Washington 25, D. C., Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, Washington 25, D. C., John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C., and Edward L. Scheufler, United States Attorney, Kansas City, Missouri, air mail postage prepaid.

2. On the Interstate Commerce Commission, by delivering a copy to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, and by delivering a copy to James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, at their offices in Washington, D. C.

3. On the J-T Transport Company, Inc., appellee herein, by mailing copies in duly addressed envelopes, air mail postage prepaid, to James W. Wrape, Esq., and Glenn M. Elliott, Esq., Wrape and Hernly, 2111 Sterick Building, Memphis, Tennessee, and to John E. Park, Esq., 1007 Bryant Building, Kansas City, Missouri, its attorneys.

4. On other appellees herein, by mailing copies in duly addressed envelopes, to their respective attorneys of record, as follows:

With first class postage prepaid, to Clarence D. Todd, Esq., and Charles F. Riddle, Esq., 1825 Jefferson Place, N.W., Washington 6, D. C., and with air mail postage prepaid, to Lowell L. Knipmeyer, Esq., Waltower Building, Kansas City 6, Missouri, Attorneys for Contract Carrier Conference of American Trucking Associations, Inc.

With air mail postage prepaid, to John H. Kreamer, Esq., 1007 Bryant Building, Kansas City, Missouri, Attorney for Aerospace Industries Association of America, Inc.

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ROLAND RICE